Supreme Court, U.S.
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No. 05-611

In The

Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns a long, bitter dispute over allocating Missouri River water among seven states and a number of Indian tribes. The water is allocated under neither a decree nor an equitable apportionment agreement. It is allocated by the Army Corps of Engineers under the 1944 Flood Control Act. The Act requires that the Corps equitably balance the many uses to which the river is put. Uses include municipal drinking water, commercial navigation, recreation, farmland irrigation, industrial water supply, and hydropower generation. The court below, relying on a two-sentence dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), that misread the 1944 Act, improperly allocated water for downstream navigation, giving priority to a use that provides less than 1% of the river's economic benefits. The court below rejected a balanced allocation that respects all interests in the basin. It also rejected the Corps' statutory interpretation that conforms to the Act's plain language, thereby failing to give any deference to the agency. The question presented is:

> Whether the two-sentence dictum in *ETSI Pipeline*, which gives navigation a priority at the expense of other uses, should govern how Missouri River waters are allocated?

RULE 14(1)(b) STATEMENT – LIST OF PARTIES

The following are parties to the proceeding below:

State of Missouri
State of Nebraska
State of North Dakota
State of South Dakota
Mandan, Hidatsa, & Arikara Nation

United States Army Corps of Engineers
United States Department of the Interior
United States Fish & Wildlife Service

American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America, Inc.

MO-ARK Association, a Kansas non-profit
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.
Coalition to Protect the Missouri River, a Missouri non-profit
ConocoPhillips Co.

RULE 14(1)(b) STATEMENT –
LIST OF PARTIES – Continued

Midwest Area River Coalition 2000, a Missouri non-profit
Missouri River Technical Group, an Iowa non-profit
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.

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PETITION FOR A WRIT OF CERTIORARI

North Dakota and South Dakota respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 421 F.3d 618. App. at 1. The opinion resolved a number of cases filed in several different districts that were later consolidated in the District of Minnesota by the Federal Judicial Panel on Multi-District Litigation. The District of Minnesota's decision is at 363 F.Supp.2d 1145. App. at 35.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944), are in the Appendix at 90-113.

STATEMENT

A. Introduction

"A river . . . offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This case is about adhering to Congress' plan to assure a fair rationing of Missouri River waters among the seven states and six Indian reservations through which it flows – Montana, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, and reservations at Fort Peck, Fort Berthold, Standing Rock, Cheyenne River, Lower Brule, and Crow Creek. It is about whether North and South Dakota, states that made profound sacrifices to protect the basin from floods, will be allowed an appropriate measure of benefit from the reservoirs built in the two states; reservoirs that flooded towns, farms, ranches, and more than a million acres of some of their best land.

Congress' plan was to use the river to develop the economies in the basin. The Dakotas, in return for the reservoirs' presence, were promised immense irrigation projects. That promise was not kept. The Dakotas, however, built for themselves a recreation industry, of which Lakes Oahe and Sakakawea are cornerstones. But the lake-based recreation industry is jeopardized by the ruling below. The court of appeals – relying on an erroneous reading of the 1944 Flood Control Act in two sentences of *ETSI Pipeline* dictum – held that the Corps of Engineers is not obligated to use Missouri River waters efficiently and economically, but must give priority to the lavish water needs of the small, marginally economic, downstream navigation industry, an industry worth only $9 million annually and one that provides less than 1% of the river's economic benefits. A navigation priority undermines endangered

species recovery and adversely affects such uses as hydropower and recreation, uses with annual values of $674 million and $87 million. As a long-time participant in Western water issues states: "The Missouri River is fundamentally unfavorable to commercial navigation. . . . [N]avigation will never develop in a meaningful way . . . " John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis and Clark for Missouri River Managers*, 6 Great Plains Nat. Resources J., 121, 125 (2002).[1]

B. Statutory Background

In 1944 the Corps of Engineers proposed a management plan for the Missouri River. H.R. Doc. No. 78-475 (1944). The primary author was Col. Lewis Pick and so the Corps' plan became known as the "Pick Plan." It recommended constructing five dams on the river and described the proposed reservoirs as "multiple-purpose" facilities. *E.g.*, *id.* at 26, 27-28, 30. Its plan was to provide for the "most efficient" use of the river "for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 29.

The Bureau of Reclamation presented a plan authored by William Sloan that proposed three dams. S. Doc. 78-191 (1944). The Sloan Plan was also for "multiple purposes." *Id.* at 1. Not only were navigation, irrigation, water supply, and power generation mentioned, but the Secretary of the Interior stated that "[s]ubstantial and material

[1] Thorson was appointed by the Arizona Supreme Court in 1990 as Special Master for general stream adjudications and served ten years. He has written dozens of articles on water resources law and policy and chaired the ABA's Water Resources Committee.

benefits would accrue through recreational use of the waters and facilities proposed." *Id.* at 2. The plan would "create exceptional opportunities for expanding fish and wildlife programs," and its reservoirs would "provide recreational opportunities of major importance." *Id.* at 13.

The Corps and Bureau reconciled their differing plans in a Joint Report. App. at 100. In the 1944 Flood Control Act Congress adopted the two plans "as revised and coordinated by [the Joint Report]." App. at 97. The Report states that the basin's development is to secure benefits for "flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 109. The Joint Report, and Congress through its adoption of the Report, did not set priorities among these uses.[2]

C. Factual Background

Under the 1944 Flood Control Act five dams were built on the Missouri River. Garrison Dam in North Dakota formed Lake Sakakawea. The lake is huge. It extends 178 miles and has 1,300 miles of shoreline. *North Dakota v. United States Army Corps of Engineers*, 270 F.Supp.2d 1115, 1129 (D.N.D. 2003). Four reservoirs are in South Dakota and one, Lake Oahe, is as large as Lake Sakakawea. *Id.* It extends into North Dakota. *Id.*

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[2] There is an exception to this. The O'Mahoney-Milliken amendment, 33 U.S.C. § 701-1(b), gives priority to upstream consumptive uses, such as appropriations for irrigation and drinking water. App. at 92. These uses have priority over navigation. *Id.* The district court agreed that the Amendment sets this priority. App. at 45. That ruling was not appealed and is not an issue in this proceeding. In addition, the court below ruled that flood control is a "dominant function" of the Act. App. at 15. The Dakotas do not challenge this ruling.